BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8437
File: 20-371143 Reg: 04058254

7-ELEVEN, INC., and SHUZI ITO dba 7-Eleven #2237 20304B
455 West Grantline, Tracy, CA 95376,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: April 6, 2006
San Francisco, CA

ISSUED JULY 20, 2006

7-Eleven, Inc., and Shuzi Ito, doing business as 7-Eleven #2237-20304B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Jeanette Chamniss, having sold a six-pack of Bud Light beer to Brandon Richardson, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Shuzi Ito, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Botting.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 19, 2001. On

[1]The decision of the Department, dated April 25, 2005, is set forth in the appendix.

October 29, 2004, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on September 3, 2004.

An administrative hearing was held on March 17, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and appellants had not established an affirmative defense.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants' motion to compel discovery was improperly denied; (2) appellants were denied due process as a result of an ex parte communication; and (3) the penalty is excessive.

DISCUSSION

I

Appellants assert in their brief that their pre-hearing motion seeking discovery of all decisions certified by the Department over a four-year period "where there is therein a finding or an effective determination that the decoy at issue therein did not display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense," was improperly denied. Appellants allege that ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellants failed to show that the requested items were relevant or would lead to admissible evidence.

Appellants spend much of their brief arguing that the provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings, a contention this Board rejected in numerous cases in 1999 and 2000 (see, e.g., *The*

Southland Corporation/Rogers (2000) AB-7030a), all of which were argued by the same law firm representing the present appellants. Those decisions of the Appeals Board held:

> "[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in §11507.6. (Gov. Code, §11507.5.) The plain meaning of this is that any right to discovery that appellants may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code §11507.6, not in the Civil Discovery Act. . . . . [¶] In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 "shall state . . . the reason or reasons why the matter is discoverable *under that section* . . . ." [Emphasis added.] [¶] Therefore, we believe that appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellants' arguments in the present appeal, repeating, almost verbatim, the arguments made in 1999 and 2000, are no more persuasive today than they were six or seven years ago.

Appellants argue they are entitled to the materials sought because they will help them "prepare its [sic] defense by knowing . . . what factors have been considered by the Department in deciding how a decoy's appearance violated the rule" (App. Br. at p.14) so that they can compare the appearance of the decoy who purchased alcohol at their premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule." (App. Br. at p. 13.) They assert "it is more than reasonable" that decisions in which decoys were found not to comply with rule 141(b)(2) "could assist the ALJ in this case by comparison." (*Ibid*.) However, appellants do not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy found not to display the appearance required by the rule had some particular indicium, or combination of indicia, of age that

warranted his or her disqualification. We have considerable doubt, however, that any such indicia, which an ALJ would only be able to examine from a photograph or written description, would be of any assistance in assessing the appearance of a different decoy who is present at an administrative hearing.

The most important indicium at the time of the sale is probably the decoy's facial countenance, since that is the feature that confronts the clerk more than any other. Yet, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellants' attorneys represent well over half of all appellants before this Board. We would think, therefore, that the vast bulk of the information appellants seek is already in the possession of their attorneys, a fact of which the Board can take official notice. This, coupled with the questionable assistance the information sought could provide to an ALJ in assessing the appearance of a decoy present at the hearing,[2] persuades us that ALJ Gruen did not abuse his discretion in denying appellants' motion.

II

Appellants assert the Department violated their right to procedural due process when the attorney representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellants also filed a Motion to Augment Record (the motion), requesting

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[2] Unless a minor is deceased or too ill to be present, or unless the minor's presence is waived, he or she must be produced at the hearing by the Department in all cases charging violations of Business and Professions Code sections 25658, 25663, and 25665. (See Bus. & Prof. Code section 25666.)

that the report provided to the Department's decision maker be made part of the record. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[3]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his

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[3] The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellants at the hearing. Appellants have not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellants have not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellants, it appears to us that appellants received the process that was due them in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellants are not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellants' motion is denied.

III

The ALJ imposed the standard 15-day penalty for a first sale-to-minor violation, stating:

> Counsel for Complainant recommended the standard penalty of a fifteen (15) day license suspension for a first time violation of the law prohibiting sale of alcoholic beverages to minors. Respondents' counsel contended any penalty should be stayed in its entirety due to respondents' exemplary record, referring apparently to a lack of disciplinary history during the more than two and one half years respondents have operated under the Department's off-sale beer and wine license.

Appellants complain that the ALJ erred in computing the length of time they had been licensed, and contend that, had he computed it correctly, he would have found mitigation, and ordered a lesser penalty.

Appellants have been licensed since January 19, 2001. The violation occurred on September 3, 2004, *three years and almost eight months* later.

It is, thus, readily apparent that the ALJ's penalty determination rested on a mistaken premise.

There is no certainty that, had the ALJ's computations been correct, he would have imposed a lesser penalty. We are not in a position to say that a three year and nine month period free of discipline automatically constitutes mitigation. At the same time, we cannot affirm a penalty based on a mistaken premise.

We think it more appropriate that the case be remanded to the Department for

reconsideration of the penalty, using the undisputed period of discipline-free operation as a consideration.

ORDER

The decision of the Department is affirmed except as to penalty. The case is remanded to the Department for reconsideration in light of our comments herein.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.